2005

Bertina Rae Olseth, an individual Plaintiff and Appellant v. Matthew D. Larson, an individual, Defendant and Appellee : Brief of Appellant

Utah Court of Appeals

Case No. 20051180

IN THE SUPREME COURT OF UTAH

BERTINA RAE OLSETH, an individual
Plaintiff and Appellant,

vs.

MATTHEW D. LARSON, an individual,
Defendant and Appellee.

ON CERTIFIED QUESTION FROM THE U.S. TENTH CIRCUIT COURT OF APPEALS (Case No. 04-4169)

On Appeal from the Final Judgment of the
United States District Court, District of Utah

Honorable Paul G. Cassell, Presiding.

BRIEF OF APPELLANT

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**** ORAL ARGUMENTS REQUESTED ****

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

I.
PARTIES.

This is an appeal from *Orders* entered by the United States District Court for the District of Utah denying Plaintiff's/Appellant's Motion To Alter Or Amend Judgment and for granting Defendant/Appellee Matthew Larson's Motion For Summary Judgment in a deadly force § 1983 civil rights suit based upon statute of limitations. Defendant/Appellee Larson is the sole defendant in this matter, he is responsible for illegally shooting Bertina Rae Olseth while she was in police custody. Olseth is the Plaintiff/Appellant.

II.

RECORD ON APPEAL.

Olseth has filed an Appendix containing the District Court Docket, pleadings and other matters including a transcript of the hearing on Larson's *Motion For Summary Judgment*. The materials contained in that Appendix will be cited by referring to the name of the document followed by "App." and the page number of the *Appendix* on which the document may be found. Olseth has also included in her *Brief* an *Addendum* containing the *Orders* appealed from. The materials contained in the *Addendum* will be cited by referring to the name of the document followed by "Add." and the page number of the *Addendum* on which the document may be found.

III.

STATEMENT OF JURISDICTION.

This Court has jurisidiction pursuant to Utah Code Ann. § 78-2-2 (1953, as amended) ((1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States. The U.S. Tenth Circuit Court of Appeals certified the question before this Court resulting from Olseth's appeal of her 42 U.S.C. § 1983 civil rights action against a police officer who wrongful shot her several times from behind – excessive force claim. The U.S. District Court's jurisdiction was involved under 28 U.S.C. § 1343, 28 U.S.C. § 1331, and 42 U.S.C. §§ 1983, 1988. Case law requires the U.S. District Court to "borrow" the appropriate statute of limitations because the Congress failed to establish one.

IV.

STATEMENT OF ISSUES.

Is the statute of limitations tolled under Utah Code Ann. § 78-12-35 when a person against whom a claim has accrued has left the state of Utah and has no agent within the state of Utah upon whom service of process can be made instead, but the person is amenable to service pursuant to Utah's long-arm statute, Utah

Code Ann. § 78-27-24? Answer is "yes" statute of limitations is tolled. Section 78-27-24 only establishes in personam jurisdiction upon non-residents. Section 78-12-35 concerns the tolling of subject matter jurisdiction while a Utah resident is absent from the state of Utah.

V.

STATEMENT OF THE CASE.

1. Plaintiff filed her first action in this matter on May 15, 2000 against Salt Lake City Corporation, Salt Lake City Police Department and various police officers of Salt Lake City, (Case No. 2:00-CV-0402C), including Larson. (App. 53). That action alleged civil rights violations resulting from Plaintiff's arrest and injuries sustained when she was shot while commandeering a police vehicle on May 15, 1998. (App. 1-24, 30-37, 54). The only cause of action pled in her Complaint, relevant to this action, was for an alleged 42 U.S.C. § 1983 violation based on her allegation of unlawful use of deadly force. (App. 47). The only relief pled in her Complaint was for compensatory damages, prejudgment interest, and attorney's fees and costs. (App. 47).

2. Plaintiff's first Complaint was dismissed by Judge Campbell on May 15, 2002 for failure to prosecute. Plaintiff filed her second Complaint on October 11, 2002 against the same parties, regarding the same facts and allegations, but

which sought to add new causes of action. The City moved for dismissal of all causes of action and parties. (App. 47). On June 6, 2003, the court granted in part the City's motion, allowing only the "loss of limb or member" cause of action to remain against the City. (App. 47).

3. Upon the stipulation of the parties, Plaintiff amended her Complaint on September 17, 2003. (App. 25, 47). Plaintiff's Complaint named Matthew D. Larson as the Defendant in his individual capacity, and asserts a cause of action against him under 42 U.S.C. § 1983 for alleged violations of Plaintiff's 14th, 9th and 10th Amendment rights. (App. 47).

4. In his *Motion For Summary Judgment*, Larson claimed he was never sued in his individual capacity until Plaintiff filed her second Complaint on October 11, 2002, more than four years after the incident complained of. He argued that because Olseth sued Larson *for the first time* in his individual capacity beyond the general 4 year statute of limitations period her Complaint must be dismissed. (App. 31, 48).

5. In opposition to summary judgment, Plaintiff asserted two defenses: (1) that Utah Code Ann. § 78-12-40 (1953, as amended) extends the statute of limitations by one year when a dismissal resulted in the first case's dismissal upon procedural grounds, and (2) due to Larson's absence from the State of Utah, the

statute of limitations period was tolled under Utah Code Ann. § 78-12-35 (1953, as amended). (App. 59-60).

6. Then in a surprising maneuver, at the hearing on oral arguments for summary judgment, Larson's counsel raised a new argument. Relying on *Rodman* and *Lund*, Larson asserted that Utah Code Ann. § 78-12-35 was not available as a defense to summary judment. Relying on these cases, it was proffered without any factual support, that Mr. Larson was amendable to service and therefore the statute of limitations had run. (App. 87, 89).

7. Based upon the surprising argument, on March 2, 2004, the court granted summary judgment, but reserved for Plaintiff 10 days in which to move to alter or amend judgment, if desired. (App. 85, 101).

8. Within 10 days, on March 9, 2004, Olseth filed her motion arguing that Section § 41-12a-505 did not control because that section applied only to nonresident motor vehicle accident cases, where the State Legislature created an agent and a procedure for personal service upon a nonresident driver through the Department of Commerce. Because an agent exists in the state of Utah in those situations, a nonresident motor vehicle operator defendant is amenable to service and therefore tolling under Section 78-12-35 is not available. (App. 108-112).

9. Without any opposition by Larson, the Court denied the motion only

claiming that Olseth failed to address the *Rodman* case. (App. 149-151).

VII.

SUMMARY OF THE ARGUMENTS.

Judge Cassell was incorrect to deny the *Motion To Alter Or Amend Judgment*. (App. 149-153). The denial was plain error and an abuse of discretion in that he was opposite to the governing case law. Firstly, no evidence existed that Larson was ever amenable to service and it was undisputed that he was absent from the State of Utah. (App. 87). Secondly, The *Motion To Alter Or Amend Judgment* was unopposed by Larson–under local rule D.U.Civ.P. 7-1, default should have been entered. Finally, it is indisputable that the first lawsuit was dismissed on procedural grounds and that a filing against a police officer in his official capacity versus a lawsuit against him in his individual capacity are both procedural errors. (App. 47). Pursuant to Utah Code Ann. § 78-12-40 (1953, as amended), a second lawsuit can cure these types of errors contained in Olseth's first lawsuit. (App. 59-61).

VIII.

ARGUMENTS.

POINT I. THE PLAINTIFF'S CLAIMS WERE TOLLED DUE TO LARSON'S (A RESIDENT) ABSENCE FROM THE STATE.

As this Court is well aware, Congress provided no specific statute of limitations for actions under the Civil Rights Acts. 42 U.S.C. 1988 endorses for the Civil Rights Acts the "settled practice" of adopting a state limitations period when the federal statute provides no such period, provided the state limitations period is not inconsistent with federal law or policy. *Wilson v. Garcia*, 471 U.S. 261, 266-67, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985); *see also Owens v. Okure*, 488 U.S. 235, 239, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989). As the Supreme Court has acknowledged, section 1988 mandates a three-step procedure for selecting such a state limitations period:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."

Burnett v. Grattan, 468 U.S. 42, 47-48, 82 L. Ed. 2d 36, 104 S. Ct. 2924 (1984) (citations omitted) (quoting 42 U.S.C. 1988); *accord Wilson*, 471 U.S. at 267. Since section 1983 indisputably contains no statute of limitations, the trial court must consider and apply the appropriate statute of limitations, subject to any tolling provisions available to these parties apply from the State of Utah, the state in which the Larson's shooting of Olseth occurred while she was in his custody.

While section 1988 directs the trial court to borrow state limitations periods, it provides no guidance on how to select the appropriate one. Accordingly, the Supreme Court has told us to select the "most analogous" or "most appropriate" statute of limitations. *Board of Regents v. Tomanio*, 446 U.S. 478, 485, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). It must, of course, be "consistent with federal law and policy." *Owens*, 488 U.S. at 239.

Wilson dictates a three-part analysis to determine which state statute is most appropriate or analogous:

> We must first consider whether state law or federal law governs the characterization of a 1983 claim for statute of limitations purposes. If federal law applies, we must next decide whether all 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. Finally, we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle.

Wilson, 471 U.S. at 268.

Having answered the first question affirmatively -- "the characterization of 1983 [is] to be measured by federal rather than state standards" -- the Wilson Court concluded that section 1988 directs the selection for each state of "the one most

appropriate statute of limitations for all 1983 claims." *Id.* at 270, 275.

In this matter, Olseth argued to the trial court that Utah Code Ann. § 78-12-40 (1953, as amended) was the most analogous provision applicable because this matter was the second lawsuit, after having the first matter being dismissed for procedural grounds. (App. 59-61, 85). Section 78-12-40 extends the statute of limitations for situations such as the one at hand. *See McGuire v. University of Utah Medical Ctr.*, 603 P.2d 786 (Utah 1979).

Meanwhile, Larson's proposition contradicts the obvious application of 78-12-40 the application of Utah Code Ann. § 41-12a-505 (1953, as amended) it is clear from reading both *Lund v. Hall*, 938 P.2d 285 (Utah 1997) and *Ankers v. Rodman*, 995 F. Supp. 1329 (U. Dist. 1997) of which neither case if factually similar to the facts this matter–clearly the cases are distinguishable. (App. 85-93).

Before the trial court, Plaintiff admitted the factual allegations contained in Larson's motion for summary judgment, but debated the argument that "Because [Olseth] sued Larson for the first time in his individual capacity beyond the statute of limitations period her Complaint must be dismissed." (App. 56). In disputing the claim, the plaintiff argued that the statute of limitations was (1) extended by Section 78-12-40 and (2) tolled by his absence from the state under Section 78-12-35. It is indisputable that Larson now resides in Oklahoma, and as conceded by

counsel has since 2001. The effect of counsel's admission is that Olseth's claims have been tolled as against Larson. See Section 78-12-35. This section read:

> Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-12-35 (2003). In this matter, the second sentence of 78-12-35 is important to understand Olseth's position on appeal.

In Utah, it is well recognized that the statute runs only during the time a debtor is openly in state, and immediately on his leaving it the statute again ceases to run until his return; in computing time all periods of absence must be considered and added together. *Keith-O'Brien Co. v. Snyder*, 51 Utah 227, 169 P. 954 (1917). In this matter, although it is unclear to Olseth as to a particular date the defendant left the state of Utah, and it is uncertain whether he has ever returned, Olseth contends that Officer Larson has removed himself from the state for a couple of years prior to Judge Cassell's dismissal of the second lawsuit. Based upon information and belief Larson left the state for an FBI position in Oklahoma shortly following Olseth's1999 trial.[1] (App. 57).

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[1] Consequently, due to Officer Larson's absence from the State of Utah, Judge Cassell's ruling is technically voidable. When the City sought its dismissal of Plaintiff's malicious prosecution cause of action it fully was aware of the fact that

In defense to Ms. Olseth's claim, the Defendant, by proffer alone represented that Mr. Larson was amenable to personal service but offered no evidence to support the notion, only armed with the cases *Lund* and *Rodman.* (App. 89). That in court utterance is non-applicable misleading the court to dismiss. The statement was only a mere bald statement without any factual support. For Summary Judgment purposes, absent any supporting evidence that he is truly amenable to service or by what means actual service may be accomplished, summary judgment was to be applied in the light most favorable to Plaintiff.

In *Lund*, the Utah Supreme Court in 1997 held that because the defendant was at all times amenable to service of legal process due to a true and lawful attorney's appointment, hence the tolling provision did not apply. In its reasoning, the *Lund* Court explained that the legislature had established substituted means of personal service in Section 41-12a-505. *Lund* case is unique because it was a motor vehicle accident involving a nonresident motorist. In Olseth's situation, this matter is entirely distinguishable from *Lund.* In this matter, the defendant was a Utah resident, and then subsequently absent himself from the State of Utah.

Larson had left the State tolling that issue. This Court through a material act was misled to rule against Olseth. Meanwhile, this Court should remand this matter for further determination as to when Larson left the State and if ever, returned to the State. The record of devoid of any evidence to support the proposition that Larson was ever amenable to service.

Because he relocated himself and his family, noone remained to accept service. The means of service of process in *Lund* was statutorily set forth in Utah's Nonresident Motor Vehicle Act. That act specifically sets forth a means of service of process for nonresidents involved in a motor vehicle accident. The Act **appoints** the Division of Corporations and Commercial Code as the true and lawful attorney of legal process within the State of Utah for the purpose of accomplishing service. Due to the existence of a legal representative, tolling was not an issue and cannot be an issue in an accident involving a motor vehicle accident of a nonresident. In contrast, Mr. Larson, clearly a Utah resident at the time he breached his duty to protect his prisoner when he shot Olseth several times from behind for doing nothing more than embarrassing him after he arrested her, had no attorney in fact, statutory appointed alternate means of personal service, or an authorized agent to accept personal service on his behalf. The record in this case shows that when specifically requested, the City attorney's office refused to accept service at ever juncture. (App. 90).

Later on, after committing perjury during Olseth's State criminal proceedings, the record reflects that Larson undeniably left the state of Utah in 2001. It's important to understand Olseth was acquitted of the aggravated assault charge Larson falsely accused Olseth of committing. Moreover, its important to

know that the City and Mr. Larson wrongfully concealed exculpatory evidence from Olseth and her defense counsel during that criminal trial. (App. 118-121). The material information contained in these exhibits was never mentioned at trial despite cross-examination.

Upon his absence, Larson was no longer amenable to personal service in the State of Utah, at all. Even though, Larson's counsel merely argued that Larson *was* amenable to personal service, the trial court accepted that statement alone and then dismissed Olseth's final claim by granting summary judgment for statute of limitations. (App. 87, 98). There is no factual record to back the statement up. The Nonresident Motor Vehicle Act does not apply to this matter. No other statutes excludes Larson in his situation, not even Utah's Long Arm Statute, 78-27-24. Unlike the Nonresident Motor Vehicle Act, the Long-Arm Jurisdiction Act does not provide a substitute method of accomplishing service of process in the State of Utah. This Court in the case *Burt Drilling, Inc. v. Portadrill*, 608 P.2d 244 (1980) addresses the purpose of Section 78-27-24. In it, this Court held that Section 78-27-24 created *in personam* jurisdiction over individuals not within the state of Utah and required them to fulfill the two-part test to establish "minimal contacts." Minimal contacts was not the issue here, nor was the issue that Larson was a nonresident. At all times relevant to the suit, Larson was a resident and had

since absent himself from the State of Utah. Therefore, tolling was the only appropriate argument the court should have accepted pursuant to Utah Code Ann. § 78-12-35. It's important to recall that it is the moving party's responsibility to demonstrate through supporting evidence how was he amenable to service by actual presence within the State or that the appointment of a true and lawful attorney existed to actually defeat Olseth's tolling argument. Once Larson no longer maintained his residency in Utah, and he and his family left the State, Larson no longer had a legal representative. Section 41-12a-505, appoints "a true and lawful attorney." In this matter, no such true and lawful attorney is or admittedly was established clear until 2003, when Mr. J. Wesley Robinson final accepted service after repeated attempts. In the former Tena Campbell action, The City refused to act as Mr. Larson's true attorney. As a matter of fact, as Mr. Robinson admitted in this proceeding, the former action was one in Mr. Larson's official capacity or against the City in other words. Well even in that matter, the City required personal service upon him anyhow when Olseth served only the City originally. The City and Larson cannot reap the benefits of having it both ways. Equitable tolling doctrines were created to protect injured parties from mischief. Once the true circumstances of Mr. Larson's residency was discovered, the fair answer from this Court should be that upon discovery that Larson was no longer

available for process of service within the state of Utah, under the discovery doctrine, Olseth should have one year to effect proper service. This ruling fairly provides adequate due process protection for all interested parties, including these litigants, the Federal Court system, and Utah citizens and its visitors alike. This appears to be a case of first impression, therefore there is no cited caselaw.

As for the *Rodman* case, *Rodman* is nothing more than persuasive authority and in this matter is not even that. *Rodman*'s situation is unique to the case at hand. *Ankers v. Rodman*, 995 F. Supp. 1329 (U. Dist. 1997), the district court judge, David Sam dismissed Ankers' civil action be in his opinion the matter was time-barred. Judge Sam was correct in this matter because that action was a diversity claim filed in Federal Court because Dennis Rodman had assaulted Lavon Ankers during a Utah Jazz versus San Antonio Spurs NBA basketball game. Ms. Ankers, who was an usher in the Delta Center was in her assigned position in the arena near the court. At one point during the fourth quarter of play, Mr. Rodman pinched Ms. Ankers on the buttocks. She sued Rodman for battery and intentional infliction of emotional distress nearly two years after the incident. In Utah, these types of claims must be filed within one year of the incident. Plaintiff argued tolling under section 78-12-35. Appropriately tolling was not available under that situation because the defendant *Rodman* was not a Utah

resident. Clearly Mr. Rodman never was a Utah citizen and Ankers knew that or reasonably should have known that he was not given the Antonio Spurs namesake. Unlike Mr. Rodman, Larson in this matter was a Utah resident, however. Until it was discovered Larson was no longer a Utah resident, that period should be tolled for her protection.

Judge Cassell was plainly wrong for granting summary judgment. Under either theory, sections 78-12-40 or 78-12-35, the statute of limitations was not an issue. Because of the dismissal by Judge Campbell in the first lawsuit section 78-12-40 extended the statute of limitations period by a year. Because Larson absent himself from the state in 2001, the statute of limitations period was tolled from 2001 for the time thereafter.

POINT II. NO EVIDENCE OF LARSON'S ALLEGED AMENABILITY TO SERVICE WAS EVER DEMONSTRATED–MOREOVER NO RECORD EXISTS OF AMENABILITY TO SERVICE.

On summary judgment, the standard of practice is well-settled in this circuit and Utah, taking our direction from the Supreme Court. The Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) has dictated that the burden of persuasion is first on the moving party and the court must construe the facts before it in light most favorable to the moving party. In

this case, this standard was not followed. In this matter, the Court accepted the time-bar claim simply on the proffer by counsel that Larson was amenable to service. Larson's counsel provided no evidence to the record to demonstrate that Larson was ever amenable to personal service. (App. 87). Quite to the contrary, the record demonstrated that Larson was never amenable to service. (App. 106-148, 82-103). In both actions, the first lawsuit, the City Attorney's Office specifically required Plaintiff to effectuate personal service upon Larson even though the complaint erroneously pled against Larson in his official capacity. Because of his personal service, he cannot later argue no notice–he has his attorneys to thank for that. Later, after the first lawsuit was dismissed by Judge Campbell for failure to prosecute, and since Larson was no longer in the state of Utah, the City Attorney's Office refused to accept service claiming (1) not to be his attorney, and (2) not have any contact with him.[2] (App. 111).

In this matter, because the clear weight of the evidence shows that Mr. Larson had left the state of Utah, the district court plainly should have applied Utah Code Ann. § 78-12-35. Again this section reads:

> Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter

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[2] At no time was it revealed to Olseth though that Larson had left the state to join the FBI in Oklahoma.

> after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-12-35 (2003). *Lund*'s parent case, *Snyder v. Clune*, 15 Utah 2d 254, 390 P.2d 915 (Utah 1964), first ruled on the nonresident motor vehicle issue. *Snyder*, assists us in the understanding the application of 78-12-35. Justice Crockett conceded that on a superficial look 78-12-35 could apply but then reasoned against it applying the nonresident motor vehicle act, declaring, "The effect of [the nonresident motor vehicle act established in 1948] is to constitute the Secretary of State as the agent of a nonresident motorist to receive process for [the defendant]. Further pertinent to this problem is Rule 4(e) (1) U.R.C.P., which states that personal service may be made upon a defendant '* * * by delivering a copy to an agent authorized by appointment or by law to receive service of process.'" *Id.*, 15 Utah 2d 256. (Emphasis added.)

These decisions, both *Lund* and *Snyder* do not disturb the well-settled case of *Keith-O'Brien Co. v. Snyder*, 51 Utah 227, 169 P. 954 (1917) concerning section 78-12-35. The *Keith-O'Brien*, Court held that absence from the state tolls the statute, [] that the statute runs only during the time the debtor is openly in the state and immediately on his leaving it the statute against ceases to run until his return, and that in computing time all the periods of absence must be considered

and added together.

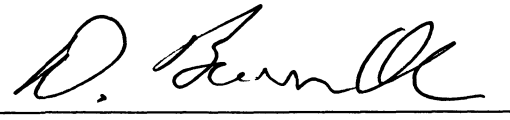
CONCLUSION

The district court used *Lund* and *Rodman* without factual support to conclude that the statute of limitations had expired. The court granted summary judgment against Olseth's § 1983 claim for wrongful use of deadly force believing that the claim was time-barred because Larson was amenable to personal service. But clearly the Nonresident Motor Vehicle Act and Rodman's Texas residency are the reasons neither case controls the outcome of this matter. Under either Sections 78-12-35, 78-12-40, or both, summary judgment never should have been granted. Under the points argued above, and the governing statutes, case law, and court rules cited, summary judgment should be reversed and the matter should be remanded for trial. In the alternative, the district court should take evidence concerning the City's amenable for service claim–and service by publication is not acceptable as an answer from the defendant or we may find ourselves back on appeal. It is a form of reliable personal service such as what the Nonresident Motor Vehicle Act provides that is the appropriate answer.

ORAL ARGUMENTS REQUESTED.

In this matter, Olseth hereby requests oral arguments because the facts and history of the case is significant and are extremely detailed. Olseth believes that once the details are clearly understood, a ruling in her favor is imminent. Because of Larson's ambush at the hearing on oral arguments, it is understandable why the trial court mistakenly accepted Larson's counsel's argument of amenability to personal service. Once the judge made his mind however, he was unwilling to alter his judgment even when Olseth's motion to alter or amend judgment was unopposed. Olseth requests oral arguments to give this court an opportunity to answer questions that may arise among panel members through a review of the briefs in this matter.

RESPECTFULLY SUBMITTED this 21st day of April, 2006.



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CERTIFICATE OF MAILING.

I, D. Bruce Oliver, hereby certify that on this 21st day of April, 2006, I caused two true and correct copies of **Appellant's Brief** to be mailed, first-class postage prepaid, to the following:

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